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IN THE

Supreme Court of The United States

October Term, 1956

VALLEY BELL DAIRY CO., INC., et al,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Upon Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF PETITIONERS IN REPLY TO BRIEF IN OPPOSITION OF THE UNITED STATES

DALE G. CASTO,
HOMER A. HOLT,
STANLEY C. MORRIS,
JOHN V. RAY,
JOHN T. KEENAN,
Attorneys for Petitioners.

KAY, CASTO & CHANEY,
JACKSON, KELLY, HOLT & O'FARRELL,
STEPTOE & JOHNSON,
PAYNE, MINOR, RAY, PRICE & LOEB,
Of Counsel.

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INTRODUCTORY STATEMENT

While it is believed that the petition is of itself a refutation of the Government's brief in opposition, this reply brief is filed for the purpose of further clarifying the issues presented.

STATUTES INVOLVED

The statute conferring upon Courts of Appeals jurisdiction of appeals from final decisions of District Courts, 28 USC, Sec. 1291, reads as follows:

> "§ 1291. *Final decisions of district courts*
>
> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The statute conferring upon Courts of Appeals jurisdiction of appeals from certain interlocutory decisions of District Courts, 28 USC, Sec. 1292, reads as follows:

> "§ 1292. *Interlocutory decisions*
>
> "The courts of appeals shall have jurisdiction of appeals from:
>
> "(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> "(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes

thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting."

STATEMENT*

In the Government's statement (GB 4) it is said that a few days after the grand jury was charged by Judge Moore on April 30, 1956, the petitioner, Valley Bell, moved to quash, in part, the subpoena duces tecum served upon it. As a matter of record, Valley Bell's motion to quash was first made prior to the re-convening of the grand jury and prior to Judge Moore's giving the charge (P 10; TR 10, 11, 15, 28, 29).

In the Government's statement (GB 5) it is said that the District Court ruled that the Government must show the materiality of the information sought by the subpoena duces tecum, but the Government does not, in its brief, point out that Judge Moore had stated (GA 4),

> "The court is not going to permit in this or any other case a wholesale investigation that is not grounded on some reasonable belief. The grand jury has complete investigative powers

*Note: "P" will refer to Petition; "TR" to Transcript; "GB" to Government's Brief; and "GA" to Government's Appendix. Unless otherwise noted, emphasis is that of counsel.

> but is not justified in making examinations into private business unless there is a starting point, that is, unless there is a belief based on some reasonable facts known to the government that there is ground for that investigation, and if there is such a belief the investigation must be given such scope as will produce all the material information.
>
> "If counsel for either side do not agree with those principles you had better say so now so that we can clear them up.";

and that, in response to said statement, Mr. Moore, one of the government attorneys, had said (GA 5):

> "Mr. MOORE: If your honor please, I am in complete agreement. The government is in complete agreement with the principles as you state them. * * *".

In the Government's brief (GB 5), it is said:

> "* * * The court, in granting the motion, emphasized that the subpoena had issued before the grand jury had begun hearing evidence, and said that if the grand jurors should ask for the documents 'they will probably get them' (*id.*, pp. 8-9). However, when the grand jury later reported that it had voted overwhelmingly to have the documents produced (*id.*, p. 12), the district judge characterized this action as being 'just an attempt to circumvent the order of the court,' and granted a renewed motion to quash (*id.*, p. 32)." ("*id.*" refers to the Government's Appendix.)

But the statement does not show that Judge Moore referred to the "attempt to circumvent the order of

the court" only after he had ascertained that the request and vote of the grand jury was initiated by the government attorneys and that the written request had been prepared by the government attorneys in advance of the grand jury's consideration of its interest in the designated records (GA 10, 14) and after the foreman of the grand jury had stated that the government attorneys had given no reasons why they wanted the records (GA 12).

ARGUMENT

THERE BEING NO CASE, CONTROVERSY, OR LITIGATION, BUT ONLY AN INQUIRY, IN THE DISTRICT COURT, THERE WAS NO CASE, CONTROVERSY, OR LITIGATION IN RESPECT TO WHICH THE COURT OF APPEALS HAD POTENTIAL APPELLATE JURISDICTION; AND HENCE THE COURT OF APPEALS WAS WITHOUT JURISDICTION TO AWARD MANDAMUS UNDER THE "ALL WRITS ACT", 28 USC 1651.

The Government concedes (GB 9) that the jurisdiction of Courts of Appeals is exclusively appellate. The Government must also concede that the orders of Judge Moore directed by the Court of Appeals to be vacated are not final decisions within the meaning of 28 USC, Sec. 1291, or interlocutory decisions within the provisions of 28 USC, Sec. 1292, which are the only provisions from which Courts of Appeals derive their general appellate jurisdiction. Certainly, no special appellate jurisdiction of the Courts of Appeals is here involved.

The petitioners do not question that the "All Writs Act" is available to Courts of Appeals in respect to

pending cases, controversies, and litigation prior to the time when an appeal may be sought or may be perfected. But the petitioners respectfully insist that there must be a case or controversy or litigation in respect to which there is potential appellate jurisdiction before the "All Writs Act" is available to Courts of Appeals. Mere potential litigation is not sufficient to support potential appellate jurisdiction.

Save for the very decision of the Court of Appeals for the Fourth Circuit for the review and reversal of which the petition herein was presented, the respondent cites no authority whatever for the use of the "All Writs Act" by the Court of Appeals to review the orders of a District Court made in connection with a mere grand jury inquiry. It is believed that there is no such authority.

The Government's Authorities Do Not Support The Claim Of Jurisdiction Of The Court Of Appeals

The Government, in Part I of its argument, commencing at page 9 of its brief, cites or refers to the cases hereinafter briefly commented upon, not one of which, however, sustains the Government's position.

In *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, there was litigation, an indictment to which the defendant had filed a plea in abatement which the District Court had stricken. The Court of Appeals, by mandamus, sought to require the District Court to reinstate the plea in abatement. Upon certiorari, the Supreme Court of the United States reversed the Court of Appeals, holding that mandamus did not there lie.

In *Ex parte Peru*, 318 U. S. 578, there was litigation. A libel had been filed in the District Court against a vessel owned by the Republic of Peru. The Supreme Court of the United States, without waiting for the case to reach it through the usual appellate procedures, upon motion for leave to file a petition for a writ of prohibition and/or mandamus decided that the libel should be dismissed for the reason that the Republic of Peru, being a foreign nation, enjoyed immunity from suit, the controversy calling for diplomacy rather than litigation.

In *Ex parte United States*, 287 U. S. 241, there was litigation. An indictment had been returned and the District Judge had declined to issue a bench warrant. The Supreme Court of the United States awarded the writ of mandamus requiring the issuance of the warrant. The late Mr. Chief Justice Stone, in referring to this case in his opinion in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 31, referred to the writ of mandamus in *Ex Parte United States* as simply requiring the performance of "a plain ministerial duty".

In *United States* v. *United States District Court*, 334 U. S. 258, there was litigation—the well-known Aluminum Company of America antitrust action. The Court of Appeals, which had reviewed the case under a special act of Congress conferring jurisdiction because of the want of a quorum of the Supreme Court of the United States, had disclaimed jurisdiction to issue mandamus to require the District Court to comply with the mandate of the Court of Appeals, in the belief that the jurisdiction of the Court of Appeals under the special act had ended. Upon certiorari, the Supreme Court of the United States held that the Court of Appeals had

jurisdiction and of course mandamus was proper to require compliance with the mandate.

In *Chicago, R. I. & P. R .R.* v. *Igoe*, 220 F. (2d) 299, referred to by the Government in the footnote on page 11 of its brief, there was litigation—an action against the railroad for wrongful death. The case involved a motion to transfer the action to another district. The District Court had declined to order the transfer. The Court of Appeals by mandamus ordered the District Judge to enter an order effecting the transfer, but not, however, without strong dissent. Circuit Judge Finnegan strongly dissented and characterized the decision of the majority of the court as usurpation (220 F. (2d) 306). That this Court denied certiorari (350 U. S. 822) does not necessarily mean that this Court approved the decision of the Court of Appeals. However that might be, there was a pending case—litigation.

Hale v. *Henkel*, 201 U. S. 43, involved litigation, but not the use of the "All Writs Act" in aid of appellate jurisdiction, either actual or potential. The case was *on appeal* to the Supreme Court of the United States from the Circuit Court of the United States for the Southern District of New York which had denied habeas corpus to the petitioner who had been committed for contempt for refusing to give testimony before a grand jury.

Cobbledick v. *United States*, 309 U. S. 323, did not involve the "All Writs Act". The District Court had denied a motion to quash a subpoena duces tecum and the petitioners had sought a review of the ruling of the District Court *by appeal* to the Court of Appeals. The Court of Appeals found itself to be without jurisdic-

tion, because the order sought to be reviewed was not a final order. The Supreme Court of the United States granted certiorari because of conflict of decisions of Courts of Appeals and, upon certiorari, affirmed the Court of Appeals upon the ground that the rulings upon the motion to quash the subpoena duces tecum were not appealable. (In the Petition, p. 23, by inadvertence, the *Cobbledick* case was referred to as considering mandamus.)

In this connection, while citing the *Cobbledick* case which held that the ruling upon the motion to quash the subpoena duces tecum was not appealable, the Government here asserts the right to have reviewed by the Court of Appeals by mandamus, among other things, a ruling of the character which this Court, by the *Cobbledick* case, has held not to be reviewable upon appeal. If this ruling is not appealable, then it cannot support the potential appellate jurisdiction of the Court of Appeals necessary to sustain jurisdiction under the "All Writs Act". And the Government takes this position, notwithstanding the well settled principle that mandamus is not a substitute for appeal and is not an appropriate proceeding by which to review judicial action. (See, among many, *Ex parte Newman*, 14 Wall. 152; *In re Hawkins*, 147 U. S. 486; and *Bankers Life & Casualty* v. *Holland*, 346 U. S. 379, 383.)

Further, in this connection, it is interesting to note again, as was done in the petition, that in his appearance before the District Court on October 12, 1956, Mr. Kramer, one of the government attorneys, stated: "* * * so that while the style of this proceeding in the Court of Appeals is that of mandamus, in practical effect it is really a normal adversary proceeding between counsel for the dairy company subpoenaed and

counsel for the government * * *" (P 23; TR 248-9). Yet, in seeking the mandamus, the government attorneys made parties to the action only the District Court for the Southern District of West Virginia and The Honorable Ben Moore, Judge of said Court—and none of the petitioners here who were there under investigation.

Costello v. *United States*, 350 U. S. 359, is referred to in the Government's brief. This case did not involve the "All Writs Act" or any issue of the case at bar. It was upon appeal, not mandamus, and involved only the question of whether a valid indictment might be found upon the basis of hearsay evidence.

The foregoing are all of the cases referred to by the Government in that part of its brief relating to the jurisdiction of the Court of Appeals to award mandamus in the case at bar, and it is respectfully submitted that not one of the cases offers the slightest precedent for jurisdiction of Courts of Appeals to use the "All Writs Act" in respect to a mere inquiry out of which no actual litigation has arisen; in other words, at the most, mere potential litigation.

Absence of Other Remedies Does Not Create Jurisdiction In Mandamus

But the Government says that if the Court of Appeals is without jurisdiction to award the writ of mandamus, then there is no available corrective action within the federal judicial system by which the Court of Appeals might review actions of the District Judge which the Government would seem to regard as erroneous.

With the exception of the Supreme Court of the United States, all federal courts are statutory courts. They have such jurisdiction, and only such jurisdiction, as the Congress has seen fit to confer upon them. If the Congress should be persuaded to believe that the District Courts are abusing their jurisdiction in respect to grand jury investigations, the Congress could very readily confer upon Courts of Appeals supervisory jurisdiction over District Courts in respect to grand jury proceedings, or, for that matter, general supervisory powers over the District Courts in the exercise of all of their jurisdictions. But certainly the absence of what some persons might regard as a desirable remedy, or desirable jurisdiction for Courts of Appeals, does not create in the Courts of Appeals jurisdiction which the Congress has not seen fit to confer.

It is one thing to say that mandamus lies only when there is no other remedy. It is quite another thing, and entirely erroneous, to say that mandamus always lies when there is no other remedy.

In *Ex parte Newman*, 14 Wall. 152, at 168, it is observed: "Confessedly the petitioners are without remedy by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right, and it is insisted that they ought on that account to have the remedy sought by their petition. *Mandamus* will not lie, it is true, where the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error. * * *" (See also *In re Burdett*, 127 U. S. 771; *In re Key*, 189 U. S. 84, 85; and *In the Matter of Park & Tilford*, 245 U. S. 82, 86.)

The Government in Part II of its argument (GB 13) again asserts that the absence of other remedies is a consideration strongly supporting mandamus, but the case of *Ex parte Peru* there referred to does not support the assertion. In *Ex parte Peru*, there was another remedy, appeal to the Court of Appeals. In fact, Mr. Justice Frankfurter dissented for the very reason that he thought the usual remedy of appeal should have first been resorted to before seeking prohibition or mandamus from the Supreme Court of the United States.

It is, therefore, obvious that the existence or absence of another remedy is no criterion for determining the existence or absence of the right to mandamus. The absence of a remedy no more confers jurisdiction than does the presence of a remedy take it away. Either there is jurisdiction or there is not, and the petitioners insist that there is no jurisdiction in mandamus in the Court of Appeals under the facts of this case.

EVEN IF THE COURT OF APPEALS HAD JURISDICTION, IT COULD NOT, BY MANDAMUS, SUBSTITUTE ITS OPINION AS TO WHAT IT WOULD HAVE DONE IF IT HAD BEEN THE DISTRICT COURT FOR THE DECISIONS WHICH THE DISTRICT COURT MADE IN THE EXERCISE OF JUDICIAL DISCRETION WITHIN ITS ACKNOWLEDGED JURISDICTION.

The Government (GB 13) likens the writ of mandamus to "equitable remedies". It may be that there is an element of discretion in granting or withholding relief sought by each procedure. But certainly all likeness between mandamus and equitable remedies ends there. Mandamus is not an equitable remedy. To the contrary, it is a writ at law which this Court has char-

acterized as drastic and one which should be used only under really extraordinary circumstances. (See *Ex parte Fahey*, 332 U. S. 258, 259-260; *Ex parte Collett*, 337 U. S. 55, 72.)

The District Court Acted Within Its Jurisdiction.

In their petition, the petitioners have demonstrated that the District Court had jurisdiction of the several matters in respect to which the orders complained of by the government attorneys were entered. Rule 6(g) Federal Rules of Criminal Procedure gives unrestricted jurisdiction to discharge the grand jury. Rule 17(c) of the Federal Rules of Criminal Procedure expressly provides for a motion to quash a subpoena duces tecum. Rule 6(e) of the Federal Rules of Criminal Procedure gives the District Court clear jurisdiction in respect to the preservation of the secrecy of the grand jury proceedings, which would certainly include the testimony taken by the grand jury.

The Government in its brief has not questioned that District Courts do have powers and duties in respect to grand jury investigations (see Petition 19-21) and has not questioned the jurisdiction of the District Court in any one of the above-mentioned subject matters. Apparently the Government concedes the existence of the District Court's jurisdiction in respect to all of the rulings made by the District Court.

Mandamus Not Available To Review Judicial Action Had In The Exercise Of Legitimate Jurisdiction.

In its brief the Government has wholly and completely ignored the decisions of this Court that mandamus cannot be used to review judicial action had in

the exercise of legitimate jurisdiction (see Petition 24-25 and the quotations there presented from the *Burtis*, the *Hawkins*, and the *Park & Tilford* cases); although that is exactly what the Government has asked the Court of Appeals to do, and what the Court of Appeals has done; namely, substitute its beliefs for the discretion and rulings of the District Court exercised and made within the scope of the legitimate jurisdiction of the District Court.

This reply brief will not be so extended as to comment upon all the statements made and cases cited in Part II of the Government's argument, though many of the cases cited are wholly without application to the issues here involved. The observations which follow herein are prompted by the Government's argument.

On page 14 of the Government's brief, in discussing the action of Judge Moore in excusing the grand jury, it is said:

> "* * * In short, the orders of the District Judge both impeded progress of the grand jury's investigation and foreclosed later investigation by it. Under the *decisions*, this was 'a clear invasion of the grand jury's powers' * * *",

but the Government cites not a single decision to sustain that broad charge, other than that of the Court of Appeals for the Fourth Circuit in the case at bar, for the review and reversal of which the petition herein has been presented.

Grand Jury Is Subject To Fourth Amendment To Constitution.

The petitioners do not question that a grand jury has great independence and much latitude in its investigation of crimes; but, as has been pointed out, the grand jury is an instrumentality or agency of the court and is neither an independent planet nor a tool of government attorneys (see Petition pp. 19-20). And even a grand jury is not exempt from the application of the Fourth Amendment to the Constitution of the United States which gives security against unreasonable searches and seizures and which provides that warrants shall issue only upon probable cause.

That a subpoena duces tecum is a process within the objectives of the Fourth Amendment is demonstrated by the cases, among many, of *Essgee Co.* v. *United States*, 262 U. S. 151, and *Brown* v. *United States*, 276 U. S. 134, the considerations of which are aptly summarized in *In re Grand Jury Investigation*, 33 F. Supp. 367, at 370, by the statement:

> "A subpoena duces tecum is a 'process' within the meaning of the Fourth Amendment, whose validity is tested by its reasonableness in the circumstances of the case. * * *."

A showing of probable cause was all that was asked of the government attorneys by Judge Moore prior to his ruling on the motion to quash the subpoena duces tecum, and that the government attorneys refused to make, notwithstanding the fact that the government attorneys had procured the subpoena duces tecum prior to the re-convening of the grand jury.

On page 15 of its brief, the Government refers to the case of *United States* v. *Thompson*, 251 U. S. 407, but that case did not involve the "All Writs Act". The jurisdiction of the Supreme Court of the United States there was under direct writ of error, pursuant to the Federal Criminal Appeals Act. Nor did any of the other cases there cited by the Government, *Costello*, *Johnson*, or *Blair*, involve the exercise of jurisdiction under the "All Writs Act". All of those cases involved appeals and writs of error.

The Limitations On Possession And Use Of Transcript.

In respect to the limitations placed upon the possession and use of the transcript of the evidence taken before the grand jury, it is well known that Rule 6(d) of the Federal Rules of Criminal Procedure (following the Act of May 18, 1933, 48 Stat. 58, 18 USC, Sec. 556 (1940 ed.)) was adopted to dispose of the question, on which there had been conflicting decisions, of whether the presence of a stenographer in the grand jury room violated the rules of secrecy and invalidated such indictments as might be returned. Neither the statute nor the rule purports to prescribe the disposition of the transcript of the evidence.

The Government (GB 16-17) refers to the case of *In re District Attorney*, 7 Fed. Cas. 745, 746, in support of its statement: "Judicial decisions, both before and after the 1933 statute, are unanimous in holding that the Government is entitled to retain, without restrictions or conditions, the transcript of testimony taken before a grand jury. * * *"

In re District Attorney lacks much of sustaining these broad assertions. This case involved an inquiry of the court by the grand jury concerning the disposition which should be made of the grand jury minutes and of the transcript of the evidence taken before it after it had completed its deliberations. The judge instructed the grand jury, in respect to the minutes and transcript, that: "They should be delivered to the district attorney, and by him kept among the records of the government. *They are necessary to enable him to prosecute offenders.* Should he be excluded from the jury room and refused the inspection of your minutes of the testimony, the public business of his department could not be conducted; there would be no possible means for the prosecuting attorney officially to learn large classes of facts indispensable to *the performance of his duty as public prosecutor.*"

While Circuit Judge Emmons, in giving that instruction, did not phrase it in terms of limitations and restrictions, his instruction was in substance the same as the ruling of Judge Moore. Judge Emmons' instruction made it clear that the transcript was to be delivered to the district attorney for use by the district attorney as prosecutor upon the indictments rendered. Such need was the only reason for preserving the minutes and transcript and the only reason for delivering them to the district attorney.

Judge Moore ruled that the government attorneys (who were not district attorneys of Judge Moore's district) could have the transcript and use it for the purpose of conducting a thorough investigation and, if indictments were returned, could use it in their prosecution of the cases (P 5a). Those were the very purposes for which Judge Emmons in *In re District At-*

torney advised the grand jury that the minutes and transcript should be lodged with the District Attorney.

There is another aspect in respect to which *In re District Attorney* falls far short of sustaining the position of the government attorneys in the case at bar. In *In re District Attorney*, the minutes and transcript were directed to be delivered to the district attorney—obviously the district attorney for the district within which the grand jury was sitting. The minutes and transcript would remain within the district of the jurisdiction of the District Court and would be subject to the orders of the District Court. In the case at bar, the government attorneys admittedly proposed to remove the transcript from the jurisdiction of Judge Moore's district and where, likewise admittedly, it would be beyond the reach of Judge Moore's orders (TR ...., Hearing October 12, 1956, pp. 5 and 6).

Furthermore, while the record is replete with observations by Judge Moore that he did not believe that subpoenae duces tecum for the production of evidence before the grand jury should, at least in the absence of indictment, be used for purposes of a civil action, the government attorneys repeatedly and consistently failed or refused to disclaim any purpose of using the transcript for the purposes of a civil action (TR ...., October 12, 1956, pp. 12-13).

The Government (GB 17) also refers to *United States ex rel McCann* v. *Adams*, 3 F.R.D. 396. The *McCann* case simply followed *In re District Attorney*, quoting therefrom at length, in overruling an objection that the minutes of the grand jury were turned over to the United States Attorney rather than to the Clerk of the Court. From the opinion, it clearly appears that

the United States Attorney referred to was the District Attorney.

The Cain Case

It is, of course, true that *Cain* v. *United States* (P 37a-55a) dealt with the facts of that case, as the Government insists. Such is true of cases generally. But that does not dilute the fact that in the *Cain* case it was clearly held that a District Court does have the power and duty to see that its processes for the production of evidence before a grand jury are not subverted to purposes other than the lawful purposes of the grand jury. That is the principle which Judge Moore applied in imposing limitations upon the possession and use of the transcript of the evidence here under consideration; and that is the principle which the Court of Appeals for the Fourth Circuit rejected in awarding the writ of mandamus, compliance with which would have resulted in the government attorneys receiving, without any limitations or restrictions of any character, the transcript of the evidence, and using such transcript for any and all purposes, criminal or civil, which they or their superiors may have seen fit, in the Southern District of West Virginia or elsewhere, likewise without any limitations or restrictions. This decision of the Court of Appeals for the Fourth Circuit in the case at bar is clearly in conflict with the decision of the Court of Appeals for the Seventh Circuit in the *Cain* case.

The Quashing, In Part, Of The Subpoena Duces Tecum

With respect to the direction of the Court of Appeals to Judge Moore to vacate his order quashing, in part, the subpoena duces tecum, the Government refers to

Brown v. *United States*, 276 U. S. 134. The *Brown* case did not involve the ruling of the District Court upon a motion to quash a subpoena duces tecum. The *Brown* case did not involve the use of the "All Writs Act". There was no motion to quash in the *Brown* case. The petitioner simply refused to produce the evidence demanded and was convicted of contempt. He appealed to the Court of Appeals, which certified the question to the Supreme Court of the United States.

A motion to quash is the ordinary procedure provided by Rule 17(c) of the Federal Rules of Criminal Procedure to have the judge rule upon the sufficiency and appropriateness of the subpoena duces tecum. Brown did not seek the ruling of the court before refusing to produce the evidence sought.

In the absence of a motion to quash, a subpoena duces tecum calling for the production of records may be fair upon its face, so far as the materiality of the records is concerned. But when the materiality of the records is directly challenged by a motion to quash, as was done by the petitioner Valley Bell in the case at bar, there must be some showing of materiality, as was held in *Hale* v. *Henkel*, 201 U. S. 43, at 77, wherein it was observed:

> "* * * Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or *some evidence of their materiality produced*, to justify an order for the production of such a mass of papers. * * *"

On this principle, with which the government attorneys had fully agreed (GA 5), Judge Moore simply took judicial action within his acknowledged jurisdiction.

CONCLUSION

For the reasons stated in the Petition and in this Reply Brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DALE G. CASTO,
HOMER A. HOLT,
STANLEY C. MORRIS,
JOHN V. RAY,
JOHN T. KEENAN,
Attorneys for Petitioners.

KAY, CASTO & CHANEY,
Charleston National Bank Bldg.,
Charleston, West Virginia;

JACKSON, KELLY, HOLT & O'FARRELL,
Kanawha Valley Bldg.,
Charleston, West Virginia;

STEPTOE & JOHNSON,
Kanawha Valley Bldg.,
Charleston, West Virginia;

PAYNE, MINOR, RAY, PRICE & LOEB,
Kanawha Valley Bldg.,
Charleston, West Virginia; and

JOHN T. KEENAN,
Charleston National Bank Bldg.,
Charleston, West Virginia;

Of Counsel.